APPENDIX

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM L. GUNTER and
CAMILLE S. GUNTER,

Petitioners,

vs.

THEODORE M. HUTCHESON
et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS
FOR THE ELEVENTH CIRCUIT

A P P E N D I X

TABLE OF CONTENTS

Appendix A -- Gunter v. Hutcheson, 492 F. Supp. 546 (N.D. Ga. 1980). . A1

Appendix B -- Gunter v. Hutcheson, 492 F. Supp. 546, 562 (N.D. Ga. 1980) (on motion for reconsideration and rehearing) A60

Appendix C -- Gunter v. Hutcheson, No. 80-8176 (11th Cir. Feb. 9, 1981) (Order granting Application for Leave to Appeal from an Interlocutory Order) A80

Appendix D -- Gunter v. Hutcheson, No. 81-7129 (11th Cir. Apr. 30, 1982) A82

Appendix E -- Statutes and Regulation. A140

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM L. GUNTER and
CAMILLE S. GUNTER

v.

THEODORE M. HUTCHESON
et al.

Civil Action
File No. C76-1702A

ORDER OF COURT

Filed in Clerk's Office
March 7, 1980

Ben H. Carter, Clerk
By: /s/ M.H., Deputy Clerk

ORDER OF COURT

This action is one of many to arise out of the failure of the Hamilton National Bank of Chattanooga (HNB/C). On December 31, 1974, the plaintiffs purchased 61% of the stock of the Hamilton Bank and Trust Company of Atlanta (HB&T/A) for $5.5 million from defendant Theodore M. Hutcheson. The Gunters allege that during the negotiations preceding the stock purchase some of the defendants caused fraudulent misrepresentations concerning the financial condition of HB&T/A to be made to the Gunters. These alleged misrepresentations include, among others, the following:

* * *

> (b) The Chattanooga Bank would leave seven million dollars in certificates of deposit in the Atlanta Bank for at least one year from the Gunters' acquisition of the stock;
>
> (c) The Atlanta Bank had and would continue to have a federal funds

line of at least one million dollars ($1,000,000) through the Chattanooga Bank;

* * *

(f) The Atlanta Bank was projected to make five hundred thousand dollars ($500,000) per year, and Mr. and Mrs. Gunter would make enough in dividends from the Atlanta Bank to pay interest on the notes; and

(g) The interest on notes given by Mr. and Mrs. Gunter would be deferred until January, 1977, and upon the giving of a balance sheet showing the separate assets and liabilities of Mr. Gunter, apart from those of his wife, new notes would be substituted for notes to be given at the closing of the Gunters' purchase of the stock, and those new notes would be payable by Mr. Gunter only. The new notes would provide for interest payments only for the first two years, with principal to be payable thereafter over a ten year period at ten percent of principal per year for seven years and the remaining thirty percent of principal in the last year.

Amended Complaint, ¶16(b), (c), (f), (g). These alleged misrepresentations were not in writing, were not executed by the HNB/C, were not approved by the Board of Directors of the HNB/C, and were not official records of the HNB/C.

In order to finance the acquisition of the HB&T/A stock, the Gunters borrowed $5.5 million from HNB/C, giving HNB/C two notes in the original principal amounts of $2.5 million and $3 million and securing those notes with the HB&T/A stock. Only the $3 million note is involved here.

On February 16, 1976, the Comptroller of the Currency declared the HNB/C insolvent and appointed the FDIC as receiver. The FDIC in its capacity as insurer may adopt either of two procedures when faced with a bank failure. It may arrange for payment of insured deposits and then liquidate the bank's assets over a period of time, or alternatively, assist the receiver in arranging what is commonly known as a "purchase and assumption" transaction. The latter procedure usually enables the FDIC to minimize the losses to its deposit insurance fund, avoid the disruption of a payout, and provide maximum protection to

depositors of the failed bank. In the case of the failure of the HNB/C, the FDIC determined to use the purchase and assumption procedure in order to achieve the aforementioned goals. Miailovich affidavit ¶¶ 2, 4, 6; Agreement of Sale between FDIC as receiver and FDIC as corporate insurer (Exhibit B to Miailovich affidavit) (hereinafter Agreement of Sale) pp. 1-2.

The adoption of the purchase and assumption procedure required the FDIC to find a bank willing to assume the liabilities of the failed bank when paid a compensating amount of assets. Although the transaction was effected quickly to maintain the "going concern value" of the failed bank, the liabilities of HNB/C exceeded its assets by $70 million--$384 million of liabilities as compared to $314 million of assets. To obtain the right to purchase the HNB/C liabilities, First Tennessee National Bank (FTNB) bid approxi-

mately $16 million, thus reducing the net liabilities-assets discrepancy to approximately $54 million. The FDIC in its capacity as insurer may, pursuant to 12 U.S.C. § 1823(e), provide financial assistance to the receiver to facilitate a purchase and assumption, and in this case the FDIC agreed to pay the receiver $54 million. Miailovich affidavit ¶¶ 2, 4, 6.

In order to effect the purchase and assumption with the promptness necessary to ensure the retention of the going concern value of the failed bank's assets, the purchasing bank cannot immediately examine the loans of the failed bank to determine whether they are of acceptable quality. Miailovich affidavit ¶ 7. The purchaser is thus given a period of time in which to examine the loans and to return to the receiver any unacceptable loans. Id.; Purchase and Assumption Agreement between

First Tennessee National Bank and the FDIC as receiver (Exhibit A to Miailovich affidavit) (hereinafter Purchase and Assumption Agreement) § 3.1(c). One of the means by which the FDIC as corporate insurer attempts to effectuate the aforementioned goals of a purchase and assumption is by agreeing to acquire from the receiver any returned assets, Miailovich affidavit ¶ 7, and in this case it did acquire the Gunter note from the receiver for $3,220,794.50 after it was returned by FTNB. Agreement of Sale § 1.1. When the FDIC acquired the Gunter note in its corporate capacity, it had no actual knowledge of any violations of the securities laws. Miailovich affidavit ¶ 9.

The plaintiffs, William L. and Camille S. Gunter, seek rescission and damages for alleged fraud in connection with their purchase of stock in the HB&T/A; against the

FDIC, the Gunters seek only rescission. Plaintiffs have attempted to state claims under the following theories: (1) Count I --Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5; and Exchange Act § 29, 15 U.S.C. § 78cc; (2) Count II--1933 Securities Act § 17(a), 15 U.S.C. § 77q; (3) Count III--Ga. Code Ann. §§ 97-112(a) and 97-114; (4) Count IV--Ga. Code Ann. §§ 105-301, 302, and 304; and (5) Count V--common law fraud and deceit. The FDIC has counterclaimed for payment on the $3 million note given by the Gunters to HNB/C (and now held by the FDIC) to finance the purchase of stock. The case is presently before the Court on the motion of defendant FDIC for summary judgment with respect to plaintiffs' claims and defendant FDIC's counterclaim. For purposes of this motion the FDIC admits plaintiffs' allegations of fraud.

Defendant FDIC advances two legal theories in support of its motion for summary judgment. First, the FDIC argues that under 12 U.S.C. § 1823(e) it may disregard any agreement which the Gunters seek to enforce against the FDIC. At oral argument and in its post-argument brief, the FDIC emphasized a related argument -- i.e. that federal common law allows the FDIC to disregard any fraud upon which the Gunters rely in seeking to invalidate the note.[1] Second, the FDIC contends that Section 29 of the Exchange Act precludes the use of the fraud allegation by the Gunters against the FDIC in its capacity as insurer because it acquired the Gunter note in good faith, for value, and without actual knowledge of any violations of the securities laws. Plaintiffs respond in several ways. First, they argue that a transferee of a note takes no greater rights than his transferor had.

Second, they insist that 12 U.S.C. § 1823(e) is inapplicable on these facts. Third, they contend that there is no principle of federal common law which protects the FDIC. Fourth, they contend that the FDIC has failed to satisfy the requirements of Section 29 of the Exchange Act because the FDIC has not really acted in two separate capacities with respect to its handling of the Gunter note and further because the FDIC had notice of defenses to collection on the note. Finally, they maintain that in any event Section 29 provides no defense to their claims based on Securities Act Section 17 and common law fraud. In reply to the latter argument the FDIC argues that for several reasons the Gunters have no cause of action under Section 17 and further that under common law, bona fide purchaser principles the FDIC had no notice of any fraud when it obtained the note in question.[2]

I. 12 U.S.C. § 1823(e).

Defendant's primary argument, based on 12 U.S.C. § 1823(e), relies upon the following language from that provision:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from time of its execution, an official record of the bank.

Although there are several cases dealing with the applicability of 12 U.S.C. § 1823(e), none are very helpful in resolving the precise issue confronting this Court. Section 1823(e) immunizes the FDIC from such defenses to payment on a note as collateral agreements to make future loans,

FDIC v. Allen, CA No. C78-592A (N.D. Ga. June 21, 1979); FDIC v. Vogel, 437 F. Supp. 660, (E.D. Wis. 1977), to cancel a note if the purpose of the loan proves unobtainable, Dasco v. American City Bank & Trust Co., 429 F. Supp. 767 (D. Nev. 1977), to fund loans made to a guarantor's business, FDIC v. Smith, 466 F. Supp. 893 (N.D. Ga. 1979), and to treat overdrafts as a loan, West v. FDIC, 149 Ga. App. 342 (1979). This case is more difficult than those because in this case the Gunters assert fraudulent inducement as a basis for rescission of the note.

The parties have pointed to only one case on point, but its rationale is very questionable. In FDIC v. Rockelman, 460 F. Supp. 999 (E.D. Wis. 1978), on facts very similar to these, the court upheld the FDIC's attempt to shield itself from allegations of fraud allegedly committed by the FDIC's predecessors in interest. The

court's entire reasoning was as follows:

> This Court has been deeply involved in actions arising out of the insolvency of American City Bank and has long considered the various problems that have arisen as a result. In addition to cases already resolved, some forty cases involving the FDIC and various individuals or legal entities are currently before this Court.
>
> Because of this Court's involvement, it has carefully weighed the problems addressed in this case. The Court has examined the relevant federal statutes, the case law concerning the FDIC in similar situations, and the history and purpose of the FDIC.
>
> Based on this analysis the Court concludes that, although the FDIC, in its corporate capacity, is not a holder in due course within the meaning of that term under the Uniform Commercial Code, Congress intended by means of Section 1823 to clothe the Corporation with the protections afforded a holder in due course and shield the Corporation against many defenses that would otherwise be available. This is the purpose and effect of this section.
>
> This conclusion furthers the intent of Congress to promote soundness in banking and to aid and protect the FDIC in the conduct of its duties. While there are some valid defenses that may be available against the FDIC, the Court need not address that issue at this juncture.

> As far as the instant case is concerned, the Court is convinced, after its careful analysis, that the affirmative defense of fraud in the inducement alleged in this case is not a valid defense against the FDIC in its corporate capacity.

460 F. Supp. at 1003. This Court is unable to discern exactly on what basis the Rockelman court found 12 U.S.C. § 1823(e) applicable,[3] as it made no attempt to fit the fraud claim into the "no agreement . . . shall be valid" language of Section 1823(e).

Another case involving the failure of the HNB/C appears to be the only case in which the Section 1823(e) immunity has been rejected. Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305 (M.D. Tenn. 1978). As might be expected, plaintiffs rely upon that case heavily. There the plaintiff alleged that the FDIC's predecessors HNB/C and Hamilton Mortgage Company had breached the terms of a contract under which the

FDIC sought payment on a note. The court concluded that the statute's reference to "agreement" was only intended to refer to independent agreements separate from the original transaction and not to the very agreement sued on. 465 F. Supp. at 312. Plaintiffs in this case argue that the fraud here was intrinsic to the original agreement. Neither the express language of Section 1823(e) nor any policy made known to the Court require that the word "agreement" be read to mean only an agreement "separate" from the original loan transaction.

Plaintiffs argue that some of the cases construing Section 1823(e) in the FDIC's favor involve attempts to obtain money judgments against the FDIC. They contend that this case is different because the Gunters seek only rescission, but they fail to show how that difference is mate-

rial. At best, plaintiffs simply argue that they cannot obtain rescission from the FDIC in its capacity as receiver because it is not the holder of the note. The fact that plaintiffs may have no one else to sue for rescission appears to have been contemplated by Congress in drafting the statute, because the language of the statute admits of no different treatment for rescission actions from that accorded damage actions.[4] The "no agreement . . . shall be valid" form of the statute just as easily contemplates a rescission as a damage action.

The plaintiffs have emphasized that Section 1823(e) prohibits enforcement of "agreements". There is arguably a "side agreement" here -- to buy the stock -- of which the misrepresentations were a part. Indeed, some of the misrepresentations can themselves perhaps be deemed agreements. See e.g. Complaint ¶ 16(b), (c), (f), and

(g) supra pp. 1-2. As defendant states it in its brief, "if this court holds that this [statute] can be avoided by the simple expedient of claiming that alleged 'side agreements' were part of a fraudulent scheme . . . breaches of alleged 'side agreement' will become 'securities fraud. . . .'" Defendant's brief of July 18, 1979 at 18.

The "shall be valid" language of Section 1823(e), however, does not so readily fit the facts of this case. Plaintiffs do not contend that the "side agreements" referred to above are "valid." To the contrary the essence of this lawsuit is plaintiffs' contention that those "agreements" are "illegal" or "invalid." Defendant has not presented the Court with any logical theory for accommodating the instant facts to that language. As indicated, supra p. 8, this emphasis on the "shall be valid" language does not interfere with the avail-

ability of the Section 1823(e) defense in other rescission actions against the FDIC, provided that in such action the FDIC shows, as the statute requires, that the would-be-rescinder is seeking to establish the "validity" of an "agreement."

Plaintiffs have also argued that Section 1823(e) is akin to a statute of frauds; like a statute of frauds, they continue, Section 1823(e) should be subject to the defense of fraudulent inducement. E.g. Inman v. Wallace, 558 S.W. 2d 559 (Tex. Ct. App. 1977); Connelly v. Merritt, 273 So. 2d 7 (Fla. Dist. Ct. App. 1973). A similar argument has been rejected by one court. Vogel, 437 F. Supp. at 663.[5]

Defendant argues that Section 1823(e) is more like a holder in due course rule than a statute of frauds; a holder in due course, of course, takes free of claims and defenses of fraudulent inducement. U.C.C.

§ 3-305. The most significant similarity between Section 1823(e) and either a statute of frauds or a holder in due course rule lies in the "writing" requirement. Compare 12 U.S.C. § 1823(e) ("No agreement . . . shall be valid . . . unless such agreement (1) shall be in writing. . . ."); Ga. Code Ann. § 20-401 ("[T]he promise must be in writing. . . ."); U.C.C. § 3-305 (defining rights of a holder in due course of an "instrument" which is in turn defined as a "writing" in U.C.C. § 3-104). The signature requirement in a statute of frauds, e.g., Ga. Code Ann. § 20-401, and in the definition of "instrument," U.C.C. § 3-104, is analogous to the requirements in Section 1823(e) that the agreement be "executed," "approved by the board of directors," and maintained as "an official record of the bank." 12 U.S.C. § 1823(e) (2)-(4). The holder in due course rule, however,

goes much further, requiring negotiation (U.C.C. § 1-201) to one who takes an instrument "for value . . . in good faith . . . [and] without notice. . ." in order to obtain this exalted status and the concomitant freedom from a claim or defense of fraudulent inducement. The Court thus concludes that Section 1823(e) is as much in the nature of a statute of frauds as a holder in due course rule. The Court need not go so far as to hold that 12 U.S.C. § 1823(e) is the exact equivalent of a statute of frauds.

The Court thus concludes that Section 1823(e) is inapplicable.

II. Federal Common Law

As in alternative argument, defendant maintains that plaintiffs are estopped, under principles of federal common law, from raising against the FDIC the claim or defense of fraud. In D'Oench, Duhme & Co.

v. FDIC, 315 U.S. 447 (1942), the FDIC made a loan of over $1 million to an FDIC-insured bank in connection with the assumption of the bank's liabilities by another bank and acquired the petitioner's notes as collateral. The petitioner D'Oench, Duhme & Co. had sold the bank bonds which defaulted. It gave the bank the notes "to enable the bank to carry the notes and not show any past due bonds." Receipts for the notes stated that "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." Id. at 454. Petitioner's president knew that the purpose of giving the bank the notes was "keep[ing] the notes alive." Id. The issue before the Supreme Court in D'Oench was whether petitioner's liability on the notes was governed by state law or federal law. The Court first observed that had "the petitioner and the bank arranged to use the

note for the express purpose of deceiving respondent on insurance of the bank, or on the making of the loan, the case would be on all fours with Deitrick v. Greaney, [309 U.S. 190 (1940)]." Id. at 457. Deitrick involved an act violative of a federal banking statute; the Court there held that public policy prohibited the defendant from relying on his own wrongful act to defeat an obligation owed to the FDIC.

Similarly, in D'Oench, the Court concluded that "Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." Id. at 459. In reaching this conclusion the Court apparently considered two factors. First, the Court recognized a "federal policy . . . to protect [the FDIC] from misrepresenta-

tions made to influence the action of [the FDIC]. . . ." and concluded that such policy dictated the result.[6] Id. The Court also observed that the petitioner "lent himself to a scheme or arrangement" which was "likely to mislead" the FDIC. Id at 460.

While the reasoning employed in D'Oench and in several cases relying thereon is fairly clear, it is not clear how, if at all, that reasoning applies to the facts of the instant case. More specifically, it is not clear what, if any, applicability those cases have to a situation, such as this, where there is no indication that anyone intended to deceive the FDIC or that the plaintiffs were involved in or "lent themselves to" any fraudulent scheme. The D'Oench line of cases provides at least a generalized basis, however, for concluding that the FDIC should be protected against plaintiffs' reliance on a claim or defense of fraud of which the FDIC was unaware.[7]

This generalized basis becomes more concrete upon application to the instant facts of (1) the Supreme Court's recent analysis of federal common law in United States v. Kimbell Foods, Inc., _____ U.S. _____, 99 S.Ct. 1448 (1979),[8] and (2) Exchange Act Section 29. The Court in Kimbell Foods observed that the application of federal common law requires a two-part analysis. First, the Court must determine whether federal common law applies at all. With respect to that issue, the Supreme Court "has consistently held that federal law governs questions involving the rights of the United States under nationwide federal programs." Kimbell Foods, _____ U.S. at _____; 99 S.Ct. at 1457. Where the United States exercises authority derived from acts of Congress "passed in the exercise of a 'constitutional function or power,'" federal common law controls.[9]

Id., quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). In the instant case the FDIC was exercising authority granted it under 12 U.S.C. § 1823.

The second, "more difficult task . . . is giving content to this federal rule." Kimbell Foods, _____ U.S. at _____, 99 S.Ct. at 1458. To hold that federal common law governs, however, does not necessarily require the adoption of a uniform federal rule.[10] United States v. Little Lake Misere Land Co., 412 U.S. 580, 594-95 (1973); Clearfield Trust, 318 U.S. at 367. Several factors bear upon the decision whether to incorporate state law or to formulate a nationwide federal rule as the Court did in D'Oench. First, one must consider whether the federal program in question "[is] and must be uniform in character throughout the Nation." Kimbell

Foods, _____ U.S. at _____, 99 S.Ct. at 1458. Second, one must determine "whether application of state law would frustrate specific objectives of the federal programs." Id. Third, it is necessary to ascertain "the extent" to which application of a federal rule would disrupt commercial relationships predicated on state law." Id. at _____, 99 S.Ct. at 1459.

In order properly to apply these criteria here, it is necessary to review the analysis employed by the Supreme Court in Kimbell Foods. The opinion in that case dealt with two cases, one involving a loan by the Small Business Administration (SBA) and the other a loan by the Farmers Home Administration (FHA). The Court was faced with the question of whether the priorities of those loans were to be determined by state or federal law.

First, in Kimbell Foods the Court found no need for a uniform federal rule

because SBA and FHA operating procedures required compliance with state law in perfecting security interests. Moreover, the Court felt that since each loan application is closely scrutinized for credit-worthiness, no significant delay in the processing of loans could be attributed to a requirement that the loans be evaluated under state law. ____ U.S. at ____, 99 S.Ct. at 1459-61. In the instant case, the FDIC does have an interest in the uniform treatment of notes which it obtains in a purchase and assumption transaction. It would be difficult, if not impossible, for the FDIC to evaluate expeditiously an insolvent bank's numerous loans which might be governed by different rules of law of several different states. To preserve the going-concern value of the failed bank's assets, the purchase and assumption must be implemented quickly--in this case, overnight.

Indeed the note made its entire journey from HNB/C to the receiver to FTNB back to the receiver, and then to the FDIC as insurer in a month. The need for such expeditious implementation of a purchase and assumption suggests that the FDIC must be governed by a uniform rule requiring that it be on guard only against fraud of which it has actual knowledge at the time the purchase and assumption transaction begins. If it then knows of fraud, it might elect to implement a purchase and assumption anyway, reasoning either that the overall cost would be less even after the FDIC is stuck with a worthless note or that the FDIC has a good chance of recovering in a fraud suit from those who committed the fraud. Where the note involved has a very high face value and/or where there are slight chances of recovery in a fraud suit, the FDIC might choose a straight liquida-

tion over a purchase and assumption. If a different rule were permitted, the FDIC would be forced to enter or not enter the transaction on the basis of incomplete information and thus at great risk.

Second, the Court in Kimbell Foods found that the application of state law would not frustrate the objectives of the federal program. The Court rejected the argument that SBA and FHA loans should receive the same treatment as federal tax liens on the grounds that "[t]he overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection" in contrast to SBA and FHA loans which serve a "social welfare" purpose. ____ U.S. at ____, 99 S.Ct. at 1462. In the tax lien area, the United States is an "involuntary creditor . . . unable to control the factors that make tax collection likely," whereas in the context of SBA and FHA loans "when

the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status." Id. In purchase and assumption transactions the FDIC cannot investigate the collectibility of a failed bank's assets until some time after the transaction has been implemented. To make the FDIC responsible for the fraud of its predecessors in interest of which it has no actual knowledge would limit the ability of the FDIC to utilize a purchase and assumption transaction. Specifically, it would cause the FDIC to enter such transactions without complete information with respect to the amount of worthless paper it may be obtaining and as to the number of lawsuits it might have to bring to recover for fraud upon its predecessors.

Finally, the Kimbell Foods Court found that application of federal law would dis-

rupt commercial affairs based on state law. The Court reasoned that "Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeard and took precedence." ____ U.S. at ____, 99 S.Ct. at 1464. Even if one assumes that purchasers of Securities, such as plaintiffs here, rely upon the various state and federal expressions of the law of fraud to protect them against deceit by sellers, that reliance will be misplaced at the point at which some rule of law such as Exchange Act Section 29 comes into play. It would disrupt commercial affairs only to the limited extent that a purchaser particularly relies on state as opposed to federal statements of the law of fraud.

Only the final factor, therefore, cuts at all against the adoption of a uniform

federal rule protecting the FDIC against fraud in situations such as the instant one, and it does so in a limited way. The plaintiffs' reliance on the state law of fraud must be balanced against the need for a uniform rule absolving the FDIC of any duty to investigate the many notes it obtains in a short period of time and the need to preserve the objectives of the FDIC's purchase and assumption program. The Court need not rely solely on that balancing analysis for there is in Exchange Act Section 29 a clear expression of the way in which federal law deals with innocent holders of notes tainted by securities fraud. The public policy and statutory interests in a purchase and assumption transaction and the statutory interest in the protection of innocent holders of notes used to purchase securities convince the Court that state law has no role in this dispute between the plaintiffs and the FDIC.

Accordingly, on the basis of federal common law, the Court GRANTS the FDIC's motion.

III. Exchange Act Section 29

The defendant has argued in its motion and brief that if it fails to get summary judgment on the entire case, then it nevertheless is entitled to summary judgment with respect to plaintiffs' Section 29 claim. Specifically, the FDIC argues that it is the sort of innocent purchaser protected under subsections (b) and (c). Section 29 provides in part:

> (b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void . . . (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowl-

edge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation. . . .

(c) Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Securities Exchange Act § 29 (b), (c), 15 U.S.C. § 78cc(b), (c). Defendant contends that it lacked the knowledge specified in

Section 29 when it acquired the note in question. Further, in an apparent attempt to head off plaintiffs' argument that the purchase and assumption transaction was not a good faith acquisition for value it also urged in its first brief that the FDIC operates in two capacities -- as receiver and as corporate insurer. It correctly anticipated plaintiffs' position, for they argue at length that the FDIC does not in fact maintain two separate capacities. The legal end result of this argument has not been made entirely clear, but apparently plaintiffs urge the Court to conclude (1) that there was no transfer, (2) that any transfer was not made in good faith, and/or (3) that no value passed. Plaintiffs argue in the alternative that notice, and not knowledge, is the proper standard and that the FDIC had notice of sufficient facts to make it question the validity of the Gunter

note. Finally, plaintiffs contend that even if the Section 29 defense is established, it applies only to claims under the Securities Exchange Act and not to Securities Act or state law claims.

At the outset, the Court must mention defendant's reliance on Shipley v. FDIC, CIV-1-78-11 (E.D. Tenn. March 22, 1979). The Shipley court granted the FDIC's motion for judgment notwithstanding the verdict reasoning as follows:

> Mr. Bonneau testified that the FDIC paid value for the note and took the note in good faith without any knowledge or awareness that it may have been executed in violation of any banking law or regulation. There was no evidence to the contrary.

To the extent that the Shipley court was concerned with the evidence adduced at that trial, it is distinguishable from the evidence presented in this motion for summary judgment. More importantly, that case did not even mention, let alone discuss, the

argument presented by plaintiffs here. The case is therefore unpersuasive here.

An analysis of the Section 29 defense reveals (1) a viable defense to plaintiffs' 1934 Act claims, as well as (2) support for this Court's view on federal common law which it stated in Part II. First, the Court notes that it is not entirely clear which part of section 29 is at issue. Fortunately, the same result obtains under each. It seems that Section 29(b) and (c)(1) establish acquisition with actual knowledge as an essential element of the plaintiffs' cause of action, while Section 29(c)(2) provides a defense to a defendant who (1) acquires (2) in good faith (3) for value (4) without actual knowledge. Plaintiffs could thus avoid the FDIC's argument under Section 29 by establishing the absence of any of those four factors. Plaintiffs have established without dispute that

there are certain interrelationships and overlaps between the FDIC as receiver and the FDIC as corporate insurer, but they have not persuaded the Court that those facts are material as to a good faith acquisition for value.

A. "Good Faith."

The plaintiffs' argument that the defendant does not operate in two capacities seems most relevant to the "good faith" question. As defendant argues, case law clearly establishes that the FDIC may operate in two capacities for some purposes. E.g. FDIC v. Ashley, 585 F.2d 157 (6th Cir. 1978); FDIC v. Godshall, 558 F.2d 220 (4th Cir. 1977). Plaintiffs correctly note, however, that those cases dealt with capacity in the context of whether federal jurisdiction was proper under 12 U.S.C. § 1819.

Even if the precedent cited is not controlling, the good faith in the purchase

and assumption is reflected in the functional and policy justification for the purchase and assumption:

> First, the sale of the "unacceptable assets" to the FDIC in its corporate capacity reduced the risk of loss to the FDIC as an insurer of deposits and facilitated the assumption of [HNB&C's] deposit liabilities and "acceptable assets" by the [FTNB].
>
> * * *
>
> Second, the assignment agreement eliminated the need for constant court supervision of a receivership. A receiver needs court authority for the disbursement of funds to pay expenses, the negotiation of settlements, the issuance of accountings, and the payment, pro rata, of creditors. By virtue of the assignment agreement, the FDIC owned the "unacceptable assets" and could liquidate them without court supervision.
>
> Finally, there was an uninterrupted continuation of bank business operations.

Ashley, 585 F.2d at 163; See also Miailovich affidavit ¶¶ 2, 4, 6 (discussed supra p. 2). While such goals conceivably could be achieved without the division of the FDIC into two capacities, the fact remains

that such a division has been Congressionally mandated. The FDIC Act clearly contemplates that the FDIC as receiver may sell notes and that the FDIC as corporate insurer may buy notes:

> (d) Receivers or liquidators of insured banks . . . shall be entitled to offer the assets of such banks for sale to the Corporation. . .,
>
> (e) Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine . . . purchase any such assets. . . .

12 U.S.C. § 1823.

The plaintiffs argue that this statutory division of capacities is not so clear in light of certain other language in the Act and in the FDIC's regulations. For example, 12 U.S.C. § 1822(a) provides that the FDIC as "receiver" may pay expenses "of

liquidation." In addition, plaintiffs note that under the FDIC's regulations a "liquidator" administers a "receivership." See 12 C.F.R. §§ 306.2, 306.3. In reply, the FDIC correctly contends that a "liquidation" must be effected no matter which of the two liquidation options is chosen and that "liquidator" is simply a personnel term. 12 C.F.R. § 306. Plaintiffs also urge that when the FDIC buys assets of a closed bank which it serves as receiver, the statute refers to the FDIC both as receiver and as insurer, simply as "the Corporation." The statutory scheme quoted above, however, clearly differentiates between the receiver on the one hand, and, on the other hand, the insurer.

Plaintiffs have made a strong factual record in support of their argument that there is a great overlap between the operations of the receiver and corporate in-

surer. Most importantly, the FDIC employed the same "liquidator in charge" "as receiver" and "as liquidator." The FDIC maintained no separate offices in Chattanooga for performance of the two functions it performed, and the liquidator in charge did not known whether other FDIC employees in his office were performing receiver or corporate insurer functions. While this unclear division of responsibility may cause the Court to wonder whether it is necessary for the FDIC to have the two capacities, it does not convince the Court that the purchase and assumption, a Congressionally approved, transaction with a legitimate regulatory purpose, lacks good faith.

B. "Acquired."

Under subsections (b) and (c), the FDIC must also establish that it "acquired" the Gunter note.[11] The Miailovich affi-

davit states that the FDIC in its corporate capacity "purchased" the note for $3,220,794.50. In addition, the contract between the FDIC as receiver and FDIC as corporate insurer provides for such an acquisition by the FDIC as corporate insurer. Agreement of Sale § 1. Plaintiffs' most significant argument to the contrary is that the Gunter note was neither physically moved nor endorsed when the FDIC purportedly "acquired" it. However, the fact that they seek rescission from the FDIC admits that the defendant has "acquired" the note; indeed, in their complaint they expressly seek rescission from the FDIC as "holder" of the note. Amended Complaint ¶ 22.

C. "Value."

Third, the FDIC acquired the note for payment of over $3 million to the receiver, Miailovich affidavit, ¶ 8, thus satisfying the "value" requirement of Section 29. The

plaintiffs' only attempt to controvert this fact was the statement in their supplemental response to defendant's statement of undisputed material facts, without any citation to the record, that the defendant did not "pay" in the ordinary commercial sense.

D. "Knowledge."

The final element of the Section 29 defense to rescission is the lack of "actual knowledge of the violation." Securities Exchange Act § 29(c)(2), 15 U.S.C. 78cc(c)(2). The Court observes first that the operative language is not "knowledge" but "actual knowledge." Second, subsection (c)(2) speaks of actual knowledge "of the violation," while subsections (b) and (c)(1) refers to actual knowledge "of facts by reason of which the making of such loan . . . is a violation of . . . this chapter. . . ." Subsection (c) thus establishes

a stiff burden for plaintiffs. In the face of this explicit language, plaintiffs argue that the governing standard is not "actual knowledge . . ." but rather "notice." Further, they argue that the FDIC was on notice of irregularities in the Gunter note from the time it first agreed to take back the Gunter note. Defendant points to the purchase and assumption agreement between the receiver and the FTNB and the contract between the receiver and corporate insurer, emphasizing that neither contains any reference to unacceptable notes. However, those contracts apparently assumed the unacceptability of the notes that were to be returned from FTNB for Miailovich stated that it would be assets of "poor quality," "possibly uncollectible," and "[un]acceptable" which would be returned. Miailovich affidavit, ¶ 5. Without intending any decision as to whether this is sufficient

to constitute notice, the Court believes that the "knowledge/notice" issue can be best resolved by first determining whether "knowledge" or "notice" is the controlling standard.

The Court notes at the outset that the plaintiffs have made no serious attempt to argue that the FDIC had "knowledge." In their supplemental response to defendant's statement of undisputed material facts they only state that the FDIC knew that all the returned loans suffered from some "irregularity." Accordingly, because the Court concludes for the reasons stated below that "knowledge" is the controlling standard, the defendant has established the final element of the Section 29 defense.

Plaintiffs argue correctly that the courts have construed Section 29(b) to embody the common law concept of illegal bargains, providing for "voidability" of

contracts made in violation of the law. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 387 (1970); Occidental Life Ins. Co. v. Pat Ryan Assoc., Inc., 496 F.2d 1255, 1266 (4th Cir.), cert. denied, 419 U.S. 1023 (1974); Pearlstein v. Scudder & German, 429 F.2d 1136, 1149 (2d Cir. 1970) (Friendly, J. dissenting); Gannett Co. Inc. v. Register Pub. Co., 428 F. Supp. 818, 830 (D. Conn. 1977). Such a reading of Section 29(b) has prevailed over the statute's express use of the word "void" instead of "voidable." Thus, conclude plaintiffs, the "actual knowledge" language in subsection (c) must be read to mean "notice," as notice, they contend, is the common law limitation on rescission of illegal bargains. In support of this conclusion they cite cases which make reference to a "notice" standard. Okin v. SEC, 154 F.2d 27, 31 (2d Cir. 1946); Lane v. Midwest

Bankshares Corp., 337 F. Supp. 1200, 1211 (E.D. Ark. 1972). Those references are obviously dicta, however. Moreover, those very same cases have also cited the "actual knowledge" standard. Okin, 154 F.2d at 31; Lane, 337 F. Supp. at 1211-12. Further, the courts have read the "void" language in subsection (b) as "voidable" to prevent those who have themselves committed fraud from obtaining rescission of a void contract. E.g. Mills, 396 U.S. at 387. No such policy is present where the defendant is not the alleged defrauder.

For the foregoing reasons the Court believes that the FDIC satisfies the requirements of Exchange Act Section 29. Not only does this provide a reason for granting the FDIC's motion as to the Exchange Act claim, but it also supports the conclusion reached in Part II that federal common law requires that the FDIC not be held liable for fraud in this case.

IV. Effect of Section 29 on 1933 Securities Act Counts

Defendant next contends that it is entitled to summary judgment on plaintiffs' Count II which is based on Securities Act § 17(a), 15 U.S.C. § 77q. It has offered several arguments for dismissing this Count,[12] including the contention that not to impose the limitations found in Exchange Act Section 29 on Securities Act causes of action would give the Securities Act much "broader sweep" than the Exchange Act. FDIC's Second Reply Brief at p. 4. It would be most ironic to hold that Section 29(c)'s express innocent purchaser limitation on a cause of action is not applicable to a cause of action or defense under Section 17(a), because no express cause of action or defense is provided in that section. Plaintiffs contend that if Congress had intended in Section 29 to limit the rights granted in the 1934 Act, demonstrated in Section 29

that it knew how to do so and thus could have done so expressly.

Although the applicability of Section 29 is limited to "this chapter" -- i.e. the 1934 Exchange Act -- the Fourth Circuit has held that Section 29 can affect a claim under the 1933 Securities Act, reasoning that the two Acts must be construed in pari materia. Occidental Life, 496 F.2d at 1265-67. More specifically, the Court held that the "voidability" principle of Section 29(b)[13] applies to Securities Act claims. The Fifth Circuit has also recognized the principle that the two Acts are to be read in pari materia, even with respect to a provision in the Exchange Act which, like Section 29, is expressly limited in application to the Exchange Act.[14] Tullis v. Kohlmeyer & Co., 551 F.2d 632, 635 (5th Cir. 1977). The Second Circuit has also employed the in pari materia principle

in deciding whether punitive damages are available under the 1933 Act. Globus v. Law Res. Svc., Inc., 418 F.2d 1276 (2d Cir. 1969). The court in Globus held that the limitation in Exchange Act Section 28(a) to actual damages would apply to Securities Act claims as well because to hold otherwise "would create an unfortunate dichotomy between the 1933 and 1934 Acts." Id. at 1286. "To avoid such inconsistencies courts have endeavored to treat the 1933 and 1934 Acts in pari materia and to construe them as a single comprehensive scheme of regulation." Id. Significantly, that Court emphasized the irony mentioned earlier which would inhere in implying a cause of action under Section 17(a) without imposing upon that cause of action the express limitations found in the 1934 Act. Id. at 1284.

Given the foregoing precedents, the Court concludes that any cause of action or

defense which the plaintiffs might be able to state under Securities Act Section 17(a) is limited by Exchange Act Section 29. Thus there is an independent reason for granting the motion as to the Section 17 claim as well as more support for the holding in Part II that the FDIC is entitled to summary judgment under principles of federal common law.

V. State Law Claims

The Court concludes, based on the principles of federal common law (Part II) and on the principles embodied in the federal securities laws (Parts III and IV), that no state law claim of fraud may be stated against the FDIC, because the FDIC has acquired the note in question in good faith, for value, and without actual knowledge.

VI. Summary

Section 1823(e) is inapplicable because the plaintiffs do not seek to hold "valid" the alleged side "agreements." (Part I.) The FDIC is entitled to complete summary judgment under principles of federal common law. (Part II.) In addition, the FDIC has satisfied the specific requirements of Exchange Act Section 29. (Part III.) This provides an independent reason for granting the motion with respect to the Exchange Act claim; in addition the satisfaction of Section 29 supports the holding in Part II. Once it is determined that the FDIC is entitled to summary judgment on the Exchange Act claim, it follows in this case that it is likewise entitled on the 1933 Act claim because of the in pari materia doctrine. (Part IV.) This too adds support to the holding in Part II. Finally, the FDIC is not obligated to satisfy state

innocent purchaser standards to avoid liability for fraud. (Parts II and V.)

SO ORDERED, this 4th day of March, 1980.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

1. In their post-hearing brief, the Gunters argue that the FDIC failed to state federal common law as a ground for their motion as required by Fed. R. Civ. P. 7(d). This argument is of no avail for several reasons. First, plaintiffs have not specified any relief to which they would be entitled; it would be a tremendous waste of everyone's time for the Court to ignore the argument now, only to have the FDIC file another motion based on that ground. Second, the Gunters have briefed the merits of the issue. Third, the issue is closely related to the section 1823(e) issue.

2. The Gunters have also objected to these arguments on the ground that they were not stated in the original motion. See note 1 supra.

3. See note 7 infra.

4. See Smith, where the FDIC sued on a note and Judge Murphy held that because of section 1823(e) "no money judgment is available to the defendants nor may their counterclaims act as a set-off. . . ." 466 F. Supp. at 845.

5. The Vogel court rejected an analogy to the statute of frauds and the application of the partial performance exception thereto because,

> Section 1823(e) is not simply a statute of frauds. It is based on a federal public policy. It operates to insure that the FDIC, when it expends money intrusted to it to purchase assets of a closed insured bank, can rely on the bank's records and will not be risking an impairment of the assets through an agreement not contained in the bank's records.

437 F. Supp. at 663.

6. The Court actually stated, "Those principles call for an affirmance of the judgment below." It is thus arguable, therefore, that any other reasoning was dicta.

7. Perhaps the leading D'Oench progeny is FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974). The plaintiff in that case executed a note to a bank to acquire common stock in the bank. The bank ordered its broker to issue voting trust certificates instead, and, since they were held by the bank as collateral, the plaintiff never saw them. When the bank failed, the FDIC obtained plaintiff's note in its capacity as receiver. The FDIC relied solely upon D'Oench in arguing that the plaintiff was estopped to avoid the note for failure of consideration. The Court rejected the FDIC's position, reasoning that the D'Oench principles required some sort of participation by the plaintiff. Id. at 791-92. Such an interpretation of D'Oench seems to emphasize the equitable principles of D'Oench over the public policy of preserving the integrity of banking institutions. A later Ninth Circuit case emphasized that the plaintiff need not know of the fraud but only must "lend himself" to the scheme to be estopped. FDIC v. First Nat. Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978). The court distinguished Meo as a case where "there was no secret agreement whereby the assets of the bank would be overstated. There was simply a failure of consideration of which the promisor was unaware until after the bank was closed and the suit was filed by the FDIC." Id. First National thus apparently condemned the result of overstating assets rather than the purpose of doing so. This in combination with its emphasis on the slight extent to which the maker must be involved in order to be estopped, exhibits a strong policy of protecting the FDIC against transactions

of which it is ignorant. A strong expression of such a policy is arguably found in Rockelman (quoted supra pp. 6-7), although the court did not expressly mention D'Oench or the Ninth Circuit cases.

8. The parties have not discussed Kimbell Foods in brief or oral argument. The Court has received seven briefs on this motion, and believes that it understands the positions of the parties well enough that further briefing of the effect of Kimbell Foods is not necessary.

9. Meo expressly held that "federal law controls in cases involving the rights of the FDIC. . . ." 505 F.2d at 793 n.4, citing D'Oench, 415 U.S. at 457.

10. Several cases have rejected the application of Uniform Commercial Code principles to the FDIC. E.g. Smith, 466 F. Supp. at 845.

11. At oral argument, counsel for the FDIC acknowledged that this was not an "ordinary commercial transfer." Although the precise meaning of this "non-commercial" characterization is not entirely clear, it certainly does not follow from this characterization that the transfer was a "paper transfer" without "commercial substance." Plaintiffs' Post-Hearing Brief at p. 15. The Court believes that the transfer was "non-commercial" in the sense that it was designed to achieve the results mentioned in Ashley, supra, p. 20, and in the Miailovich affidavit, supra p. 2.

12. The FDIC maintains that the plaintiffs have no implied private cause of action under section 17(a), relying on this Court's earlier holding to that effect in this case. Gunter v.

Hutcheson, 433 F. Supp. 42 (N.D.Ga. 1977). The courts have not spoken clearly on whether the principles employed in implying private causes of action apply to situations such as this where the plaintiffs seek rescission both on their own claim and as a defense to the FDIC's counterclaim. One court has held that section 29 applies to Securities Act claims, rendering transactions voidable when they violate that Act. Occidental Life Ins. Co. v. Pat Ryan & Assoc's., Inc., 496 F.2d 1255, 12____ (4th Cir. 1974). Although the plaintiffs in Occidental Life attempted to state a claim under section 17(a), id. at 1260 n.1, the court's opinion does not make it explicit whether the court was applying section 29's "voidability" principle to section 17 or to other sections of the 1933 Act such as sections 11 and 12. The recent Supreme Court opinion in Transamerica Mtg. Advisors v. Lewis, _____ U.S. _____, 99 S.Ct. 242 (1979), seems to apply the principles used in implying a private cause of action even to a determination whether a cause of action for rescission should be implied. See id. at _____, 99 S.Ct. at 250 (White, J. dissenting). This Court need not resolve the issue of whether the plaintiffs have a cause of action for rescission, because even if they do, the Court believes that the cause of action is cut off where the FDIC satisfies the innocent purchaser requirements of Exchange Act section 29.

The FDIC also contends that the plaintiffs have not shown the requisite privity between themselves and the FDIC, relying upon Hill York Corp. v. American Int'l. Fran's, Inc., 448 F.2d 680 (5th Cir. 1971); Collins v. Signetics Corp., 443 F. Supp. 552 (E.D. Pa. 1977); Hardy v. Sanson, 356 F. Supp. 1034 (N.D. Ga. 1973). Plaintiffs maintain that no

privity is required under section 17, relying upon Schaefer v. First National Bank, 326 F. Supp. 1186, 1193-94 (N.D. Ill. 1970), and that they are in privity with the FDIC, relying upon Hill York, supra. The Court need not resolve this dispute for the reason mentioned in the previous paragraph.

13. See p. 24 supra.

14. The court in Tullis was construing Exchange Act § 28(b), 15 U.S.C. § 78bb(b), which provides:

> (b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this chapter or the rules and regulations thereunder.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM L. GUNTER and
CAMILLE S. GUNTER

v.

THEODORE M. HUTCHESON,
et al.

ORDER OF COURT

Filed in Clerk's Office
U.S.D.C. - Atlanta

May 13, 1980

Ben H. Carter, Clerk
By: /s/ D.N.

ORDER OF COURT

Presently before the Court is plaintiffs' motion for reconsideration and rehearing and in the alternative for certification pursuant to 28 U.S.C. § 1292(b). The defendant FDIC opposes those motions and moves for entry of final judgment in its favor. The plaintiffs oppose the latter motion.

MOTION FOR RECONSIDERATION

Plaintiffs have urged reconsideration of the Court's March 4, 1980 order granting the FDIC's motion for summary judgment. They contend (1) that federal common law does not protect the FDIC from claims and defenses based upon fraud, (2) that the Court elevated "form over substance" in its analysis of Exchange Act section 29, and

(3) that the Court incorrectly applied section 29 to claims and defenses under the 1933 Securities Act. The following discussion is as brief as possible and should be read in the context of a supplement to the March 4 order.

I. Federal Common Law

As indicated in the March 4 order, the Court saw no need to ask for further briefing on this issue because the Court had already received seven (now eleven) briefs on the FDIC's motion and had also heard extensive oral argument. Slip op. at p. 4 n. 1, ____ F. Supp. at ____ n.1. Further, the plaintiffs have still not suggested any reason why the issue could not be raised after the original motion was filed. The Court believes it significant that in the instant motion the plaintiffs have challenged only the Court's interpretation of applicable law and have not offered to present any evidence which would tend to

create any issue of fact material under the law as the Court has interpreted it.

The thrust of the plaintiffs' position on the merits of the federal common law issue is that neither Kimbell Foods nor D'Oench and its progeny shelter the FDIC from claims or defenses of fraud and that the FDIC should be subject to state law holder in due course concepts. First, the Gunters contend that

> It is precisely when Congress has not spoken "in an area comprising issues substantially related to an established program of government operation," [United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 93 S.Ct. 2389, 2397 (1973)], that Clearfield directs federal courts to fill the interstices of federal legislation "according to their own standards." Clearfield Trust Co. v. United States, supra, 318 U.S., at 367, 63 S.Ct., at 575.

Kimbell Foods, 99 S.Ct. at 1458 (emphasis added). Plaintiffs then argue "In this case Congress has spoken in an area substantially related to the situation in issue: in 12 U.S.C. § 1823(e). . . ." Plain-

tiffs' brief of March 12, 1980 at p. 4 (emphasis added). The facial appeal to this argument is lost when one notices the difference in the language emphasized by plaintiffs and that emphasized by the Supreme Court. The Court spoke of substantial relationship to a government program; plaintiffs refer to a substantial relationship between the "situation in issue" (presumably meaning the claims of fraud) and section 1823(e). The Court concludes that Congress has not spoken to the issue of claims or defenses of fraud against the FDIC and that the availability of such a claim or defense against the FDIC is an issue substantially related to an established program of government operation" (i.e., the FDIC's purchase and assumption program).

The Gunters further contend that had Congress intended to protect the FDIC from

fraud it would have done so in section 1823(e). That argument is perfectly logical, but it is equally reasonable to assume that Congress saw no need to mention fraud when section 1823(e) was enacted in 1950 on the assumption that fraud was covered under the Supreme Court's ruling in D'Oench. Also, "it bears noting that the Court of Appeals in D'Oench specifically held that the FDIC should be treated as a holder in due course under the Negotiable Instruments Law which was then in effect, even though the FDIC had acquired the debtor's note in a purchase and assumption transaction like the one in issue here." FDIC's brief of November 30, 1979 at p. 9 n.* (citing D'Oench, 117 F.2d 491 (8th Cir. 1941), aff'd on other grounds, 315 U.S. 447 (1942). This holding could have been known to Congress when it enacted 12 U.S.C. § 1823(e) in 1950. All of this discussion

about Congressional intention with respect to the then existing case law is, of course, extremely speculative, and the legislative history behind the section simply reiterates the language of the statute itself. See [1971] U.S. CODE CONG. SVC. 3765, 3774. Legislative intent with respect to this issue, if there was any, thus can most realistically be derived from the general purpose of legislation affecting the FDIC -- to preserve the FDIC's ability to insure the country's banking system.

Next, the Gunters differ with this Court's application to this case of the three factors considered by the Supreme Court in Kimbell Foods in ascertaining the content of any rule of federal common law. First, they say that the FDIC program is not uniform throughout the nation. Plaintiffs' brief of March 12, 1980 at p. 5. In support of that argument they rely upon FDIC v.

Sumner Fin. Corp., 502 F.2d 670, 679 n. 12 (5th Cir. 1979) and Meo. In the portion of Sumner cited by plaintiffs, the Fifth Circuit was simply discussing the dual capacity of the FDIC as insurer and receiver, and in so doing it alluded to the difference between the FDIC's role as receiver of a state bank and its role as receiver of a national bank. The cited portion of Sumner thus has nothing to do with a purchase and assumption in a national bank. Meo will be discussed below.

Further, with respect to the "uniformity" inquiry required by Kimbell Foods, the Gunters contend that even if the FDIC should be governed by a uniform body of law, there is no reason to adopt a rule that always produces a uniform result -- i.e., that "that the FDIC should always be able to defeat the rights of innocent individuals induced by fraud to give their notes to an

insured bank." Plaintiffs' brief of March 12, 1980 at p. 6. The Court's ruling does not always produce a uniform result; the FDIC would not be able to defeat the rights of a maker where the FDIC had actual knowledge of fraud. The Court's ruling simply ensures that the FDIC will not have to make a hasty -- perhaps overnight -- determination of how many of a failed bank's assets may be infected by fraud.

With respect to the second factor in Kimbell Foods, the Gunters contend that the FDIC always has notice of various factors making certain obligations obtained in a purchase and assumption transaction uncollectible. Notice of uncollectibility is, of course, not equatable with knowledge of fraud, and the Court believs that it would impose a much greater burden on the FDIC to make it responsible for any fraud which taints the obligations which the FDIC assumes.

Finally, with respect to the third consideration in Kimbell Foods, the plaintiffs urge that adherence to the UCC provides a better rule, because the UCC is relied upon in commercial affairs throughout the nation. The Court acknowledged as much in the March 4 order but went on to point out that such reliance is risky where the federal securities laws come into play. Slip. op. at p. 16, ____ F. Supp. at ____.

Perhaps the most appealing argument made by the Gunters is the argument to the effect that D'Oench, Meo, and First National cannot be extended to encompass the present situation. Although those cases are not squarely on point with this one, there is language in them which admits of a very broad interpretation. For example, in First National, the Ninth Circuit said,

> It is not necessary for the accommodation maker to have knowledge of the specific scheme of fraudulent arrangement to preclude the defense; it

> is sufficient that he lends himself to a scheme to aid the bank in concealing the true nature of the transaction, thus misrepresenting the note as a valid asset of the bank.

587 F.2d at 1012 (emphasis added). Likewise the Supreme Court in D'Oench stated that "[i]t would be sufficient in this case that the maker lent himself to a scheme or arrangement whereby the banking authority on which the respondent relied on insuring the bank was or was likely to be misled." 315 U.S. at 460 (emphasis added).

Whatever the emphasized language means, the Court believes that any requirement or participation -- however active or passive the participation must be -- is outweighed by other factors. Specifically, the three inquiries mandated by Kimbell Foods apparently have not heretofore been applied in a case involving the FDIC's purchase and assumption transaction. In addition, neither D'Oench nor the

subsequent cases have dealt with the application of Exchange Act section 29. The answers to the Kimbell Foods inquiries and the innocence of the FDIC as defined in section 29 require the Court to ignore any lack of active participation by the Gunters in the alleged fraud.

II. Exchange Act Section 29

The thrust of the Gunters' argument with respect to section 29 is that the Court's March 4 order elevates form over substance in deciding that a transfer from the FDIC as receiver to the FDIC as insurer had occurred. The Court previously treated this argument in connection with the question of whether the transfer was in "good faith;" the discussion at the top of page 21 (_____ F. Supp. at _____) would apply equally to the question of whether there was a transfer. No other issue involving section 29 has been raised in the motion for

reconsideration which has not already been fully considered.

III. 1933 Act

With respect to the Court's holding on the application of Exchange Act section 29 to the 1933 Securities Act, the Court acknowledges the novelty and difficulty of the issue, but plaintiffs have not raised any issue which has not already been fully considered.

IV. Summary -- Motion for Reconsideration

For the foregoing reasons and for the reasons stated in the Court's order of March 4, 1980 the FDIC's motion for summary judgment is GRANTED and the motion for reconsideration is DENIED.

MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) AND MOTION FOR ENTRY OF FINAL JUDGMENT

The Gunters have moved for certification of the Court's March 4 order under 28

U.S.C. § 1292(b). The FDIC apparently also agrees that the March 4 order should be immediately appealable, but it would prefer that any appeal be taken from a final judgment which it requests the Court to enter pursuant to Fed. R. Civ. P. 54(b).

Rule 54(b) provides as follows:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In opposition to the entry of final judgment the Gunters correctly point out that entry of final judgment does not automatically follow from the termination of the claim(s) against one of multiple parties. In addition they contend that in this case there are two "just reason[s] for delay."

They first contend that entry of judgment might require them to post a large bond on appeal, a requirement which they believe especially onerous in view of the novelty of the issues involved in the motion for summary judgment. They also assert that their cross-claim against the FDIC as "receiver" in a related case should succeed and act as a "set-off" against the claims of the FDIC in this case. This argument is based on the premise that in this case the FDIC as insurer has contended that the Gunters should have sued the receiver. Even if the term set-off is not construed in

a narrow legal sense, but rather in a broad enough sense to comprehend simply the presence of two judgments of roughly equal amounts owed by two parties to each other, the Court does not believe the possibility that the Gunters will recover in another case material to whether the Court should enter judgment in this case.

The Gunters' other argument would likewise have little merit in most cases. In this case, however, the Court believes that it would be particularly harsh to place the Gunters in a position where a large bond on appeal might be required. This harshness arises from the novelty and difficulty of the issues involved here. The Court has decided several issues and sub-issues as matters of first impression in arriving at its ruling on the FDIC's motion for summary judgment. The Court thus believes that the relationship between

the FDIC and the Gunters should remain as nearly in status quo as possible, and thus in the language of Rule 54 the Court concludes that there is "just reason for delay" in entering final judgment.

28 U.S.C. § 1292 provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Court can hardly imagine a better case for certification under 12 U.S.C. § 1292(b). The ruling on the FDIC's motion for summary judgment required the Court to

decide several questions of first impression, i.e., (1) the question of the applicability of 12 U.S.C. § 1823(e) to a fraud case, (2) the question of the presence and content of federal common law, (3) the question of the dual capacity of the FDIC with respect to whether a transfer can be made for the purposes of Exchange Act Section 29, and (4) the question of the applicability of Section 29 to the 1933 Act. In ruling against the Gunters, the Court has placed a large practical burden on the Gunters. In the present posture of the case they must attempt to prove fraud against numerous defendants and if successful to collect what could be substantial damages from them. If the Gunters were not liable to the FDIC on the note, then they would have substantially less incentive, and the FDIC substantially more incentive, to pursue the case. Thus the FDIC's motion, as a

practical matter, raises the question of who will bear the ultimate burden of moving the litigation forward. If the Gunters were to proceed with the case on the basis of this Court's ruling and an appellate court were ultimately to disagree with this Court, then the case would have to be re-litigated. Such a procedure would be a tremendous cost to all of the many parties to this case in time and legal expenses.

Thus the Court concludes that the Court's order of March 4 "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." 28 U.S.C. § 1292(b).

Accordingly, for the foregoing reasons, the plaintiffs' motion for certification is hereby GRANTED and the FDIC's

motion for entry of judgment is DENIED. Further, the order of March 4 is hereby amended to include the above certification.

The Court has not considered the question of whether a stay of proceedings pending appeal would be appropriate.

SO ORDERED, this 12th day of May, 1980.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-8176

WILLIAM L. GUNTER
and
CAMILLE S. GUNTER,

Petitioners,

versus

THEODORE M. HUTCHESON,
et al.,

Respondents.

APPLICATION FOR LEAVE
TO APPEAL FROM AN
INTERLOCUTORY ORDER

Filed in the U.S. Court of Appeals

February 9, 1981

Gilbert F. Ganucheau, Clerk

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Northern District of Georgia entered on May 12, 1980, is granted.

/s/ GBT

/s/ RSV

/s/ TAC

WILLIAM L. GUNTER AND
CAMILLE S. GUNTER

v.

THEODORE M. HUTCHESON,
et al.

No. 81-7129

United States Court of Appeals,
Eleventh Circuit

April 30, 1982

Appeal from the United States District Court for the Northern District of Georgia.

Before MORGAN, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellants William L. and Camille S. Gunter appeal from the district court's grant of summary judgment[1] for the Federal Deposit Insurance Corporation [FDIC] in this action by the Gunters to rescind a $3 million note due to alleged securities law violations and fraud. The Gunters assert that the trial court erred in holding that the FDIC was immune from fraud claims under a rule of federal common law. For the reasons stated below, we affirm the trial court. 492 F.Supp. 546.

I. Background

The Federal Deposit Insurance Corporation is a federal agency which insures

bank deposits. As insuror one of the primary duties of the FDIC is to pay the depositors of a failed bank. The FDIC has two methods of accomplishing this duty. The simplest method is to liquidate the assets of the bank and then pay the depositors their insured amounts,[2] covering any shortfall with insurance funds. This option, however, has two major disadvantages. First, the sight of a closed bank, even an insured one, does not promote the utmost confidence in the banking system. Accounts are frozen, checks are returned unpaid, and a significant disruption of the intricate financial machinery results. Second, depositors may wait months to recover even the insured portion of their funds, and uninsured funds may be irrevocably lost.

To avoid the significant problems with liquidation, the FDIC whenever feasible employs a "purchase and assumption" trans-

action in which the Corporation attempts to arrange for another bank to "purchase" the failed bank and reopen it without interrupting banking operations and with no loss to the depositors. A purchase and assumption involves three entities: the receiver of the failed bank, the purchasing bank, and the FDIC as insuror. In most cases, the FDIC is appointed receiver by the appropriate banking authority[3] and thus acts in two separate capacities: as receiver and as corporate insurer. See FDIC v. Ashley, 585 F.2d 157 (6th Cir. 1978).

As soon as the receiver is appointed, the FDIC solicits bids from other banks for the purchase of the failed bank and assumption of its liabilities. The bids represent the "going concern" value of the failed bank. After receiving the bids, the FDIC Board of Directors determines whether the purchase and assumption is feasible ac-

cording to the statutory requirements of 12 U.S.C. § 1823(e). If a bid is accepted, the purchasing bank agrees with the receiver to buy the assets and assume the liabilities of the failed bank.

While the purchase of a failed bank is an attractive way for other banks to expand their operations, a purchase and assumption must be consummated with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services. Because the time constraints often prohibit a purchasing bank from fully evaluating its risks, as well as to make a purchase and assumption an attractive business deal, the purchase and assumption agreement provides that the purchasing bank need purchase only those assets which are of the highest banking quality. Those assets not of the highest quality are returned to the receiver,

resulting in the assumed liabilities exceeding the purchased assets. To equalize the difference, the FDIC as insuror purchases the returned assets from the receiver which in turn transfers the FDIC payments to the purchasing bank. The FDIC then attempts to collect on the returned assets to minimize the loss to the insurance fund. In an appropriate case, therefore, the purchase and assumption benefits all parties. The FDIC minimizes its loss, the purchasing bank receives a new investment and expansion opportunity at low risk, and the depositors of the failed bank are protected from the vagaries of the closing and liquidation procedure.

The mechanics of a purchase and assumption transaction likely were completely unknown to William L. and Camille S. Gunter when in December, 1974, they purchased 61% of the outstanding common stock

of Hamilton Bank & Trust Company of Atlanta [Atlanta Hamilton]. The Gunters paid $5.5 million dollars for their controlling interest in Atlanta Hamilton, which they borrowed from Hamilton National Bank of Chattanooga, Tennessee [Chattanooga Hamilton], executing two promissory notes for $2.5 and $3.0 million respectively.

At the close of business on February 16, 1976, the Chattanooga Hamilton was declared insolvent and the FDIC was appointed receiver. The Corporation immediately solicited bids on a purchase and assumption transaction and received a high bid of $16,251,000 from the First Tennessee National Bank [First Tennessee]. The FDIC accepted the bid and Chattanooga Hamilton reopened the following morning under the First Tennessee name.

The Gunter notes were among the assets transferred to First Tennessee in the

transaction. Pursuant to its rights under the purchase and assumption agreement, First Tennessee returned the $3 million note to the FDIC as receiver, which in turn sold the note to the FDIC as corporate insuror for approximately $3.2 million.

In October of 1976, the Atlanta Hamilton also became insolvent. The Gunters then filed suit against the former directors and officers of Chattanooga Hamilton, seeking damages and rescission of the notes on the basis of violation of federal and state securities laws and state and common law fraud.[4] The Gunters alleged that their purchase of the Atlanta Hamilton stock was induced by fraudulent misrepresentations made to them by the officers and directors of Chattanooga Hamilton.[5] The Gunters also sought rescission of the $3 million note held by the FDIC on the same grounds, and the FDIC counterclaimed for payment of the note.

The FDIC moved for summary judgment on the theory that it was protected by the Gunters' claims either by 12 U.S.C. § 1823(e) or by federal common law. For the purposes of the summary judgment motion, the FDIC agreed that the Gunters were defrauded into their stock purchase and that this fraud ordinarily would be adequate grounds for rescission. The district court granted the motion, holding that although the statutory protection of 12 U.S.C. §1823(e) did not extend to the Gunters' fraud claims, the FDIC had a defense to claims of fraud of which it lacked knowledge under a rule of federal common law.[6] The Gunters sought certification of this decision for interlocutory appeal under 28 U.S.C. § 1292(b). The certification was granted and accepted by this court.

II. Defenses to the State and Common Law Fraud Claims

A. The Defense Under 12 U.S.C. § 1823(e)

[1] The FDIC first asserts that the Gunters' rescission action is barred by 12 U.S.C. § 1823(e) which states in relevant part:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this action, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

The FDIC argues that the fraud asserted by the Gunters is in the nature of an agreement between the Gunters and Chattanooga Hamil-

ton's officers and directors to perform certain pormises made in connection with the Atlanta Hamilton stock sale. Because the "agreement" was not in writing, the argument continues, it cannot defeat the rights of the FDIC under the "no agreement" language of § 1823(e).[7]

We cannot agree with the FDIC's analysis of this issue, although several recent Fifth Circuit cases have involved the protection of § 1823(e), and in all the FDIC has prevailed. In Black v. FDIC, 640 F.2d 699 (5th Cir.), cert. denied, _____ U.S. _____, 102 S.Ct. 143, 70 L.Ed.2d 119 (1981), for example, the obligor attempted to prove that a real estate development loan agreement with a bank included the unwritten understanding to make construction loans on certain real estate. The court held that the unwritten agreement could not be asserted against the FDIC.

Similar situations occurred in FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981) (oral agreement to make future loans), Chatham Ventures, Inc. v. FDIC, 651 F.2d 355 (5th Cir. 1981) (assertion that bank breached joint-venture agreement), and FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th Cir. 1981) (obligor asserted that bank had agreed to take a deed in satisfaction of the debt).

The common thread running through these cases has been the assertion by the obligor than an oral side agreement with the bank controlled the rights of the parties.[8] The cases, therefore, came squarely within the "no agreement . . . shall be valid" language of § 1823(e). The claim asserted by the Gunters, in contrast, is quite different. The essence of their argument is that no agreement existed because of the fraud of Chattanooga Hamil-

ton's officers. While certain of the alleged misrepresenations could be construed as "agreements" to perform certain acts in the future, such as deferring interest on the Gunters' notes, others clearly are not agreements of any sort. For example, the Gunters alleged that the chairman of the board of Chattanooga Hamilton fraudulently represented that the Hamilton banking system was in "sound financial condition." Far from claiming that an oral agreement is "valid" and controls the rights of the parties, the Gunters assert that the entire transaction was invalid from the beginning. As the district court noted, this claim is directly opposite to the "shall be valid" language of § 1823(e). Consequently, we agree with the trial court that the fraud claims at issue here are not barred by the statutory language in § 1823.

B. The Defense of Federal Common Law

1. The Rule

Although we conclude that the specific language of § 1823(e) does not protect the FDIC from the Gunters' allegations, we agree with the trial court that principles of federal common law protect the FDIC from ordinary fraud claims of which it lacks knowledge.

Any analysis of federal common law must begin with the seminal Supreme Court case on the subject, United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Kimbell Foods dealt with the law governing priority of liens created by Small Business Administration and Farmers Home Administration loans. The SBA and FHA had argued that the priority of their liens was governed by federal, not state, law and that a uniform federal rule of first priority was necessary to protect federal interests.

The Supreme Court adopted a two-part analysis for determining the applicable law. First, the Court decided whether federal law applied at all to the SBA and FHA. The Court noted that it had "consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs," and that:

> "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

Id. at 726, 99 S.Ct. at 1457 (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67, 63 S.Ct. 573, 574-75, 87 L.Ed. 838 (1943)). Because the SBA and FHA "de-

rive[d] their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a 'constitutional function or power,'" the Court held that federal law controlled the rights of the agencies. Id. at 726-27, 99 S.Ct. at 1457-58.

Having determined that federal law was applicable, the Court moved to the second step in its analysis: giving content to this law. The Court reasoned that federal law does not always require a uniform federal rule, and that the decision on whether to formulate a uniform federal rule or adopt state law as the federal rule of decision hinged on balancing three factors: whether the federal program was one which by its nature required nationwide uniformity, whether adopting the state law would frustrate the specific objectives of the federal program, and whether applying a

federal rule would disrupt commercial relations predicated on state law.

Applying this analysis to the SBA and FHA, the Court concluded that a uniform rule of federal law was unnecessary. The Court acknowledged that adopting a state rule would not interfere either with a need for uniformity or federal objectives. The loan programs in question had already adopted state law in their operating practices, and because each loan application was already heavily scrutinized for creditworthiness, no significant delay in loan processing would result from adopting state priority rules. Moreover, unlike the federal tax lien situation, in which the United States was an involuntary creditor with no prior opportunity to protect its interest, the voluntary loan programs of the SBA and FHA provided ample opportunity for the agencies to verify the priority of

their liens under state law. Finally, the Court noted that adopting a uniform rule of first priority for voluntary federal loan programs would significantly interfere with the settled expectations of other lienholders under state law. As a result, the Court held that state law embodied in the Uniform Commercial Code was an appropriate substantive law for these cases.

Since Kimbell Foods, the federal courts have been reluctant to fashion new rules of federal law when state rules of decision provided adequate protection for federal interests. The former Fifth Circuit, for example, twice held in cases involving the SBA that state rules of decision were the proper basis for federal law governing the rights of the agency. In United States v. S. K. A. Associates, Inc., 600 F.2d 513 (5th Cir. 1979), the court followed the Kimbell Foods analysis in

holding that the Florida rule of priority for a landlord's lien over a perfected security interest controlled a suit by the SBA. Similarly, in United States v. Dismuke, 616 F.2d 755, 758-59 (5th Cir. 1980) the court held that the Georgia rule prohibiting suit for a deficiency judgment unless the prior foreclosure sale had been judicially confirmed within thirty days of the sale applied to the SBA.

In both S. K. A. Associates and Dismuke, the court stressed the Supreme Court's emphasis in Kimbell Foods on the fact that adoption of state law would not hinder the administration of the SBA loan programs and on the SBA's ability to protect its interests through the loan approval procedure. See Dismuke, supra, 616 F.2d at 759. In contrast to these cases, other federal courts have fashioned special uniform federal rules when necessary to

protect important federal interests. In United States v. Pisani, 646 F.2d 83 (3d Cir. 1981), for example, the court confronted the problem of whether the sole stockholder of a nursing home corporation would be personally liable for repaying Medicare overpayments to the corporation. The court held that a uniform federal rule governing the "piercing of the corporate veil" should displace state law when medicare overpayments were at issue in order to protect the federal interests behind the Medicare program.[9]

Given this background, we conclude, as did the trial court, that the principles delineated in Kimbell Foods mandate adopting a uniform rule of federal law to protect the FDIC from fraud claims of which it lacked knowledge. The first step in the analysis, determining whether federal law applies in the first instance, need not

long detain us. Aside from the fact that the Supreme Court has already held in D'Oench, Duhme, & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) that federal law controls the rights and obligations of the FDIC, the FDIC operates under authority derived from a specific statutory scheme passed by Congress in exercise of a "constitutional function or power" to protect and stabilize the national banking system. Hence, federal law applies.

The substance of the federal rule requires more extensive analysis. Two of the three factors enumerated in Kimbell Foods weigh heavily in favor of protection for the FDIC. First, the nature of the FDIC as insuror for a variety of banks across the country and the necessity for overnight decisions in dealing with a failed bank requires a uniform federal rule governing

the FDIC's rights. Unlike the loan programs of the SBA and FHA, which provided ample opportunity for federal officials to ascertain the impact of state law on loan decisions, decisions concerning the appropriate method of dealing with a bank failure must be made with extraordinary speed if the going concern value of the failed institution is to be preserved. Subjecting the FDIC to the additional burden of considering the impact of possibly variable state law on the rights involved could significantly impair the FDIC's ability to choose between the liquidation and purchase-and-assumption alternatives in handling a bank failure.

By far the most persuasive reason for adopting a federal rule of non-liability for fraud claims, however, is the fact that the absence of such a rule would make the FDIC's task of executing its statutory man-

date under the first paragraph of § 1823(e) nearly impossible. That paragraph reads:

> Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Coporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

Under the above paragraph, the FDIC may enter into a purchase and assumption transaction only "whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss

to the Corporation. . ." To make this statutory judgment, the FDIC must have some method to evaluate its potential liability in a purchase and assumption versus its potential liability from a liquidation. Because of the time constraints involved, the only method of evaluating potential loss open to the FDIC is relying on the books and records of the failed bank to estimate what assets would be returned by a purchasing bank and to estimate which of those assets ultimately would be collectible. The Corporation can then compare its estimated loss from a purchase and assumption against its estimated loss from a liquidation and make the statutory judgment required under § 1823(e).[10]

If the FDIC's right to collect on returned assets, however, were subject to fraud claims of which the FDIC lacked knowledge, estimating its potential loss

from the purchase and assumption would be impossible. The Corporation could not predict from the bank records which assets would likely be collectible and which would be subject to unknown claims of fraud. Consequently, the FDIC could not make the judgment necessary under § 1823(e) and the purchase and assumption method of handling bank failures would be effectively foreclosed.

Such a result would run directly counter to the policies behind the creation of the FDIC. As many courts have recognized, these policies are promoting the stability of and confidence in the nation's banking system. E.g., First State Bank v. United States, 599 F.2d 558, 562 (2d Cir. 1979), cert. denied, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980); FDIC v. Godshall, 558 F.2d 220, 221 (4th Cir. 1977); Doherty v. United States, 94 F.2d 495, 497 (8th

Cir.), cert. denied, 303 U.S. 658, 58 S.Ct. 763, 82 L.Ed. 1117 (1938). As discussed in Part I of this opinion, supra, a purchase and assumption is often the best method of promoting these goals because it avoids the spectre of closed banks and the interruption of daily banking services. Adopting a state rule of law which would permit asserting unknown fraud claims against the FDIC, therefore, would significantly interfere with the federal policies behind the FDIC.

The Gunters attempt to counter this analysis with two arguments. First they assert that the placement of the first comma in the initial sentence of § 1823(e) requires an interpretation the the FDIC can select a purchase and assumption either (1) when the risk of loss will be no greater than a liquidation and the purchase and assumption will facilitate a merger or con-

solidation with another insured bank or (2) the purchase and assumption would facilitate a sale of assets to and assumption of liabilities by another insured bank. According to the Gunters, under this interpretation the FDIC need not make any judgment concerning its potential loss unless the purchase and assumption results in a merger or consolidation as opposed to a simple sale of assets. Because a purchase and assumption rarely results in a merger or consolidation, the argument continues, adoption of state fraud rules would not impair the FDIC's use of the purchase and assumption device.

This interpretation of §1823(e) is untenable. The absorption of one corporation by another through a sale of assets/assumption of liabilities is substantively similar to achieving the same result by merger or consolidation,[11] and none of

the three devices bears any relation to the liability incurred by the FDIC. It is illogical, therefore, to hold that Congress intended the FDIC to make a risk assessment before arranging a purchase and assumption which resulted in a merger, but not when the purchase and assumption facilitated a sale of assets/assumption of liabilities. Thus we conclude that § 1823(e) requires a risk assessment by the FDIC regardless of the device used by the purchasing bank to absorb the failed bank.

The Gunters second argument is that regardless of the statutory language in § 1823(e), the FDIC does not in fact determine whether its losses under a purchase and assumption will be no greater than in liquidation. To support this contention the Gunters assert that the purchase and assumption in this case cost the FDIC more than a liquidation would have.[12] We need

not determine whether the Gunters' arithmetic is correct, however, because we find that their argument suffers from two fundamental misconceptions. First, the ultimate liability of the FDIC will not be known until it has completed its attempts to collect on the assets returned by First Tennessee. Second, the statute does not require that the FDIC know its ultimate losses to the last cent before selecting a purchase and assumption. Rather, § 1823(e) requires a reasoned judgment that the risk of a purchase and assumption is not greater than a liquidation. The statute permits error; hence the mere fact that in a particular case the FDIC's final liability in a purchase and assumption exceeds that of a liquidation does not warrant the inference that the FDIC is ignoring its statutory mandate.[13]

The necessity for an assessment of risk under § 1823(e), however, is not the

only reason for concluding that adopting state law in this situation would frustrate federal policy. As the former Fifth Circuit noted in FDIC v. Lattimore Land Co., 656 F.2d 139, 146 n.13 (5th Cir. 1981), if an obligor could assert that the failure of a bank to perform certain promises constituted fraud and grounds for rescission, the obligor would successfully thwart the "no agreement" protection of § 1823(e) "by asserting as fraudulent the same unwritten agreement of which a breach . . . may not under § 1823(e) be asserted against the FDIC." Moreover, we note that the Supreme Court itself in the past has recognized a federal policy for protecting the FDIC, albeit in a more limited manner. See D'Oench, Duhme, & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).[14]

The final Kimbell Foods factor, the effect of a federal rule on settled com-

mercial expectations under state law, is more equivocal. The Gunters strongly argue that this court should not upset the settled rules of commercial paper permitting assertion of fraud claims against one not a holder in due course in favor of a special rule for the FDIC. Unlike loan priority, however, which lenders rely on daily in processing loan application, we doubt that the eventuality of a bank failure plays a significant role in the ordinary commercial expectations of the parties to negotiable instruments. In fact, the reason the FDIC was not a holder in due course here is because the Gunter note was not transferred in the ordinary course of business. Had the bank not failed but instead transferred the note in the ordinary course of business to another institution for value, in good faith, and without knowledge of the fraud, the transferree would have taken the note

as a holder in due course, free from the fraud claims. Inasmuch as the notes contained no transfer restrictions, the latter prospect was likely more within the commercial expectations of the parties than the failure of the Hamilton banking system. The Gunters, therefore, are in no worse position under a federal rule protecting the FDIC than they would have been had Chattanooga Hamilton transferred the note to another banking institution in the ordinary course of business. Protecting the FDIC, moreover, does not leave the Gunters without a remedy; they may still pursue their action against the wrongdoers, the officers and directors of Chattanooga Hamilton. We conclude, therefore, that the potential damage to commercial expectations of a federal rule of non-liability for unknown fraud claims is far outweighed by the interference with the federal goals

of stability and confidence in the national banking system that would result from permitting such claims.

Having found that the Kimbell Foods analysis mandates a uniform federal rule prohibiting the assertion of fraud claims against the FDIC when the fraud was unknown to the FDIC, we proceed to circumscribe the boundaries of our decision. First, because this rule is based largely upon the need for quick decisions by the FDIC regarding the method to best handle a bank failure, the rule applies only when the FDIC acquires a note in the execution of a purchase and assumption transaction. In other, more normal, commercial contexts, we see no reason to relieve the FDIC from the ordinary operation of state law. Second, because another primary basis of the rule is the need for the FDIC to rely on the books and records of the failed bank in assessing its

potential liability under a purchase and assumption vis-a-vis a liquidation, the protection from unknown fraud is available only to the extent the FDIC pays value for the note and thereby jeopardizes a portion of the insurance fund. Finally, we require that the FDIC have taken the note in a good-faith execution of its part of the purchase and assumption transaction.

Accordingly, we hold that as a matter of federal common law, the FDIC has a complete defense to state and common law fraud claims on a note required by the FDIC in the execution of a purchase and assumption transaction, for value, in good faith, and without actual knowledge of the fraud at the time the FDIC entered into the purchase and assumption agreement. We note, moreover, that the rule we adopt today is in accord with similar decisions by other federal courts. See, e.g., FDIC v. First

Southern Trust Co., Nos. 80-1139 and 80-1367 (6th Cir. Jan. 13, 1982) and Gilman v. FDIC, 660 F.2d 688 (6th Cir. 1981) (holding that when FDIC acquired a note in good faith, for value, and without actual knowledge that the note was executed in violation of the securities laws, the FDIC took the note free from securities law fraud claims); FDIC v. Rockelman, 460 F.Supp. 999 (E.D. Wis. 1978) (holding that § 1823(e) impliedly gives the FDIC rights of a holder in due course).[15]

2. Defenses to the Rule

Having decided that when the FDIC acquires a note in a purchase and assumption transaction for value, in good faith, and without actual knowledge of the claims of fraud, it takes the note free of those claims, we must assess whether the FDIC has met the requirements of the rule in this case.

We note initially that here the FDIC unquestionably acquired the note in the execution of a purchase and assumption transaction and paid value for it. The Gunters, moreover, do not claim that the FDIC had actual knowledge of the fraud claims at the time of the purchase and assumption transaction. As part of their argument relating to the securities law fraud claims, however, the Gunters strongly assert that the "intra-family" transfer of the note from the FDIC as receiver to the FDIC as corporate insuror was a sham transaction which cannot meet a "good faith" requirement.

We have no quarrel with the many cases cited by the Gunters holding that intra-corporate transfers of commercial paper cannot cut off defenses of the maker. Unlike private corporations, however, the FDIC is not structured for its own conven-

ience. Rather, the division of authority between the FDIC as receiver and FDIC as corporate insuror is statutorily mandated in the Federal Deposit Insurance Corporation Act. One entire section of the Act, for example, sets standards for the Corporation as receiver. 12 U.S.C. § 1822. Section 1823(d) moreover, clearly contemplates transactions between the FDIC as receiver and FDIC as corporate insuror, stating "receivers or liquidators of insured banks . . . shall be entitled to offer the assets of such banks for sale to the Corporation. . ." In light of this Congressionally-mandated division of authority, we cannot hold that the transfer of the Gunter note according to the statutory procedure was not a good-faith transaction. Such a holding would call into question the propriety of a variety of routine intergovermental transactions which unquestion-

ably are conducted in good faith. We recognize that the Gunters in this case made a strong factual record concerning FDIC operations in Chattanooga showing that the FDIC did not maintain separate offices for its receiver and insuror capacities, and that the same FDIC personnel who acted for the FDIC as receiver also acted for the FDIC as corporate insuror. The record, however, also shows that the FDIC was fully aware of its dual capacity in executing the purchase and assumption transaction. The parties to the purchase and assumption, for example, executed two separate agreements to facilitate the transaction: one between First Tennessee and the FDIC as receiver, and a second between the FDIC as receiver and the FDIC as corporate insuror.

Finally, we note that other federal courts have recognized that under the statute the FDIC may act in a dual capacity.

FDIC v. Ashley, 585 F.2d 157 (6th Cir. 1978); FDIC v. Godshall, 558 F.2d 220 (4th Cir. 1977); FDIC v. Glickman, 450 F.2d 416, 418 (9th Cir. 1971); Freeling v. Sebring, 296 F.2d 244, 245 (10th Cir. 1961). In Ashley and Godshall, moreover, the courts held that transactions between the FDIC as receiver and FDIC as corporate insuror were bona fide transactions. Ashley, supra, 585 F.2d at 160-62; Godshall, supra, 558 F.2d at 222-23.[16] See Gilman v. FDIC, 660 F.2d 688, 695 n.11 (6th Cir. 1981) (sale of note by FDIC as receiver to FDIC as corporate insuror satisfies "good faith" criterion of the innocent purchaser defense of § 29(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(c)). We conclude, therefore, that the FDIC as corporate insuror acquired the Gunter note as part of a good faith sale of that note by the FDIC as receiver, for value, and without actual knowledge of the

Gunters' claims of fraud. Accordingly, we affirm the district court's grant of summary judgment in favor of the FDIC on the Gunters' state and common law fraud claims.[17]

III. The Federal Securities Laws Claims

Although the district court held that a rule of federal common law protecting the FDIC from state and common law fraud claims also prohibited a rescission action for securities law violations,[18] we decline to extend the rule so far. While adopting state law as to the fraud claims would frustrate the federal policies of promoting stability of and confidence in the banking system and thus must give way to a uniform federal rule, we are less confident that these federal policies behind the FDIC Act outweigh the strong policies of investor protection embodied in the securities laws. We need not decide which policies are

strongest, however, because we find that the Gunters' securities claims against the FDIC are barred by the defense in § 29(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(c).

A. The § 29 Defense

Section 29(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(c), states:

> (c) Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) of the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obli-

> gation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

The FDIC asserts that the Corporation acquired the Gunters' note for value, in good faith and without actual knowledge of the Gunters' claims; hence it has an absolute defense to the rescission action. Because the elements of the § 29(c) defense are identical to the elements of the federal common law defense adopted in part II B of this opinion, we agree with the FDIC's position in accordance with our discussion in part II B 2 of this opinion, supra.

The Gunters' arguments against the application of § 29(c) are without merit. First they assert that the FDIC did not acquire the note in good faith because the note was purchased by the FDIC as corporate insuror from the FDIC as receiver. As we held above,[19] however, the statutory

division of capacity for the FDIC makes a transfer between the FDIC as corporate insuror and the FDIC as receiver a bona fide, good faith transaction.

Second, the Gunters urge that because § 29(c) is a limitation on the language of § 29(b), which according to the Gunters embodies the common-law concept of illegal bargain, see Occidental Life Insurance Co. v. Pat Ryan & Assoc., Inc., 496 F.2d 1255, 1265-67 (4th Cir.), cert. denied, 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974), § 29(c) must also embody common-law concepts. Specifically, the Gunters claim that these common-law concepts include a requirement that the holder acquire the debt "in the ordinary course of business," and that "notice" of a claim is sufficient to take a party out of the § 29 defense despite the "actual knowledge" language of the statute. Since the FDIC did not acquire

the Gunter note "in the ordinary course of business" but as part of a purchase and assumption, the Gunters contend that § 29(c) does not apply. Moreover, the Gunters note that by making an allowance for return of "unacceptable" assets in the purchase and assumption agreement, the FDIC had notice of the possible uncollectability of the Gunter note.

We reject these contentions. The cases relied on by the Gunters to support their "illegal bargain" argument all involve interpreting the clause of § 29(b) which states "Every contract made in violation of any provision of this chapter . . . shall be void. . . ." The cases go no further than to say that "void" may be interpreted as "voidable" in order to assure that the party who has violated the securities laws cannot escape liability under the contract if the victim of the

violation insists on enforcement, or if such an interpretation is necessary to avoid other inequities unintended by Congress. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 387-88, 90 S.Ct. 616, 623, 24 L.Ed.2d 593 (1970), Occidental Life Insurance Co., supra, 496 F.2d at 1266-67; Pearlstein v. Scudder & German, 429 F.2d 1136, 1149 (2d Cir. 1970) (Friendly, J., dissenting).

In contrast to the sound policy reasons for the judicial limitation on the "void" language of § 29(b), no countervailing reasons exist to limit the express protection afforded innocent purchasers of debt securities by § 29(c). The tension between the statutory "void" language and the possibility of granting a windfall to a wrongdoer which prompted the judicial interpretations of § 29(b) is absent under § 29(c), which controls the relative rights

of two innocent parties. Moreover, the statute specifically enlarges the common-law protection of innocent purchasers by requiring "actual knowledge" in place of the more lenient "notice" standard of the U.C.C. and state holder-in-due-course statutes. See, e.g., U.C.C. § 3-302; Ga. Code Ann. § 109A-3-302. Given that Congress expanded the protection of § 29(c) beyond the common law and given the absence of any compelling policy mandating a contrary result, we conclude that § 29(c) does not embody the common-law limitations urged by the Gunters.[20]

B. Application of the § 29 Defense to Claims Under § 17(b) of the Securities Act of 1933

The Gunters' final argument is that even if their claims under the Exchange Act are barred by § 29(c), this defense is unavailable for claims asserts under § 17(a) of the Securities Act of 1933.[21] The

Gunters contend that the specific language of § 29(c) -- "Nothing in this chapter . . ." -- limits the operation of that section to the Exchange Act alone.

We reject this argument. Despite the limiting language used in several sections of the 1934 Act, courts have construed the 1933 and 1934 Acts in pari materia as a single comprehensive regulatory scheme. See Tullis v. Kohlmeyer & Co., 551 F.2d 632, 634-38 (5th Cir. 1977); Ballard & Cordell Corp. v. Zoller and Danneberg Exploration, Ltd., 544 F.2d 1059, 1066 (10th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977); Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 843 (2d Cir. 1971); Globus v. Law Research Service, Inc., 418 F.2d 1276, 1286-87 (2d Cir. 1969), cert. denied, 397 U.S. 913, 90 S.Ct. 913, 25 L.Ed.2d 93 (1970). Tullis and Axelrod, for example, involved claims by the plaintiffs that arbitration clauses in

their New York Stock Exchange membership agreements violated the non-waiver provisions of 1933 and 1934 Acts, 15 U.S.C. §§ 77n, 78cc(a).[22] The courts held that § 28(b) of the 1934 Act[23] overcame the waiver provisions of both the 1933 and 1934 Acts despite the fact that the 1933 Act had no provision comparable to § 28(b) and § 28(b) was by its terms limited to the 1934 Act. The courts reasoned that because the waiver provisions of each Act were similar, permitting arbitration under one but not the other would be illogical. Similarly, in Globus the court held that the statutory prohibition on punitive damages in § 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), should apply to actions brought under § 17(a) of the 1933 Act, despite the lack of a comparable damage limitation in the 1933 Act.

Although, as the Gunters note, the 1933 and 1934 Acts do not overlap complete-

ly, and certain rights may be available under one Act which are not available under the other,[24] in this case the Gunters' claims under the 1933 and 1934 Acts are all based on the same fraud-misrepresentation theory. Consequently we conclude that permitting an action to go forward under the 1933 Act, which does not specifically provide for a private right of action, while holding that identical claims under the 1934 Act are barred by the defense of § 29(c), would create a dichotomy between the two Acts that was not intended by Congress and that would be counter to the express protection of innocent purchasers in § 29(c). Hence we hold that assuming the Gunters may bring an action under § 17(a) of the 1933 Act,[25] that action in this case is barred by the defense in §29(c) of the 1934 Act.

IV. Summary

In summary, we hold that the Gunters' state and common-law fraud claims are not barred by the "no agreement" language of 12 U.S.C. § 1823(e), but are barred by a federal rule of common law protecting the FDIC from such claims when it acquires a note in execution of a purchase and assumption transaction, in good faith, for value, and without actual knowledge of the claims at the time of entering into the purchase and assumption. Although we decline to extend this protection to claims of federal securities laws violations in this case, we find that here the FDIC has a valid defense to those claims under § 29(c) of the Securities Exchange Act, 15 U.S.C. § 78cc(c). Accordingly, the district court's grant of summary judgment in favor of the FDIC is affirmed.

AFFIRMED.

1. This is an interlocutory appeal with jurisdiction based on 28 U.S.C § 1292(b).

2. Currently each depositor is insured up to $100,000. 12 U.S.C. § 1821(a).

3. The FDIC is required by statute to accept an appointment as receiver of a failed bank. 12 U.S.C. §1821(c), (e).

4. Specifically, the Gunters' complaint alleged violations of the Securities Exchange Act of 1934 §§ 10(b), 29, 15 U.S.C. §§ 78j(b), 78cc, and Securities and Exchange Commission rule 10b-5, 17 C.F.R. § 240.10b-5 (count I); the Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (count II); Ga. Code Ann. §§ 97-112(a) and 97-114 (count III); Ga. Code Ann. §§ 105-301, 105-302, and 105-304 (count IV); and common law fraud and deceit (count V).

5. These misrepresentations included, among others, (1) that Chattanooga Hamilton would leave $7 million in certificates of deposit in the Atlanta Hamilton for at least one year from the Gunters' acquisition of the stock; (2) that Atlanta Hamilton would continue to have a federal funds line of $1 million through the Chattanooga Hamilton; (3) that the Chattanooga Hamilton was in sound financial condition and would be able to offer continued financial support to the Atlanta Hamilton; (4) that the Atlanta Hamilton would net $500,000 per year and the Gunters would make enough in stock dividends to pay the interest on their notes; and (5) that the interest on the notes would in certain circumstances be deferred.

6. As an alternative holding, the district court ruled that the Gunters' federal securities laws claims against the FDIC were barred by

the innocent purchaser defense in § 29(c) of the Exchange Act, 15 U.S.C. § 78cc(c).

7. Alternatively, the FDIC asserts that the fraud was in connection with the sale of stock, not the note held by it. The record clearly shows that the note and stock sale were part of a single transaction, however, and we refuse to arbitrarily dichotomize this single transaction into two component parts. To do so would render the defense of fraud in the inducement a practical nullity, since the fraud usually pertains to the transaction underlying the note rather than the note itself. See, e.g., Johnston v. Dollar, 83 Ga.App. 219, 63 S.E.2d 408 (1951).

8. In Lattimore Land, the obligor asserted fraud in the inducement as a defense to an FDIC action to collect on the note. The court, however, did not reach the issue whether 12 U.S.C. § 1823(e) protected the FDIC from such fraud claims, because the court found that the misrepresentations alleged did not support an action for fraud under Georgia law. Lattimore Land, supra, 656 F.2d at 143-46.

9. Specifically, the court found that to promote prompt treatment of Medicare patients, HEW had to pay for Medicare services without investigating actual costs and financial condition of the provider of the medical services prior to the payments. To avoid the possibility that doctors would use "dummy" corporations to avoid repaying Medicare overpayments, thus damaging the overall Medicare program, a federal rule of piercing the corporate veil was necessary. The court also noted that unlike the SBA loan programs, the Medicare program required nationwide uniform rules of law.

10. The maximum liability of the FDIC in a liquidation is fixed by the $100,000-per-depositor insurance limitation. In a purchase and assumption, however, the FDIC agrees to repurchase any unacceptable assets from the purchasing bank and cannot rely on the statutory limitation of its liability. Hence to make the statutory judgment under § 1823(e), the FDIC must have some method of estimating its potential liability under a purchase and assumption to compare it to the maximum liability in a liquidation.

11. State business corporation laws, for example, generally treat a sale of all the assets of a corporation in the same manner as a merger or consolidation. See, e.g., Ga. Code Ann. §§ 22-1003 and 22-1102 (requiring shareholder approval of a merger, consolidation, or sale of assets); Ga. Code Ann. § 22-1201 (giving shareholders right to dissent from merger, consolidation, or sale of assets).

12. The Gunters assert that at closing Chattanooga Hamilton had $336,000,000 in deposit liabilities, of which approximately $128,000,000 were not insured. Hence the FDIC in a liquidation initially would have paid out $208,000,000 but received a proportionate share of the assets amounting to approximately $170,000,000. According to the Gunters, therefore, the net loss to the FDIC would have been $38,000,000, considerably less than the $54,000,000 the FDIC paid pursuant to the purchase and assumption. These calculations, however, fail to account for interest loss on the initial payout of $208,000,000 and expenses of collecting the $170,000,000 in assets which were saved by the purchase and assumption.

13. We also note that the sale agreement between the FDIC as receiver and FDIC as insurer specifically recited that the board of directors of the Corporation had found that the purchase and assumption would reduce the risk and avert a threatened loss to the insurance fund.

14. In D'Oench the obligor had sold the bank bonds which had defaulted. To permit the bank to avoid showing the defaulted bonds on its books, the obligor gave the bank notes with the secret understanding that the notes would never be repaid. When the FDIC acquired the notes in a purchase and assumption, it sued for payment. The Supreme Court held that federal law applied to the question of the obligor's liability on the notes and that given the federal policy to protect the FDIC from misrepresentations designed to influence its actions and the fact that the petitioner had lent itself to a scheme to mislead the FDIC, petitioner was estopped to deny its liability on the note.

Although D'Oench went no further than to enforce the liability of one who had "lent himself" to a scheme to defraud, the case provides a general basis for a federal policy to protect the FDIC. Moreover, D'Oench itself was an extension of the principles first articulated in Deitrick v. Greaney, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1940), in which the Court upheld the liability of an obligor on a note executed "for the express purpose of deceiving the [FDIC] on insurance of the bank. . ." D'Oench, supra, 315 U.S. at 457, 62 S.Ct. at 679. Finally, although both Deitrick and D'Oench required an element of fault on the part of the obligor, § 1823(e), which was the Congressional response to the D'Oench holding, eliminated any fault requirement. These events chronicle a broaden-

ing protection for the FDIC founded on federal policies of protecting the banking system, and we think support our federal common law holding.

15. The Gunters argue that the Ninth Circuit's decision in FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974) contradicts our holding. In Meo the obligor had executed a promissory note to the San Francisco National Bank (SFNB) to acquire part ownership of 1000 shares of the bank's stock. Instead of properly executing the order, SFNB directed its brokers to issue 1000 voting trust certificates. Appellant never became aware of the deception because SFNB held the certificates as security for the loan. When the bank became insolvent, the FDIC was appointed receiver and sued on the note, asserting that the policies delineated in D'Oench protected it from claims of breach by the obligor. The Ninth Circuit, noting that D'Oench applied only to secret agreements, held that because the appellant here had not in any way been involved in a scheme to defraud, he had a defense to the FDIC's action.

Meo, however, dealt only with the FDIC as receiver not as corporate insuror. See, id. at 791. Because the rule of federal common law we adopt today is limited to a purchase of assets by the FDIC as insuror pursuant to a purchase and assumption, Meo is not directly contradictory to our holding.

16. Appellants correctly note that the primary issue in both Ashley and Godshall was whether the federal courts had jurisdiction over the action, not the liability of an obligor on a note. Under 12 U.S.C. § 1819, however, a federal court has no jurisdiction over an action by the FDIC if the FDIC is acting only as receiver of a state bank. Thus in each

case in order to find jurisdiction, the courts necessarily had to find that the FDIC was suing on obligations in its own right rather than as receiver. Therefore, the finding by the court that the FDIC as corporate insuror had purchased the notes from the FDIC as receiver in good faith for value and hence was suing in its corporate capacity was essential to the holding that federal courts had jurisdiction under 12 U.S.C. § 1819.

17. Although our discussion in part II of this opinion has been cast in terms of ordinary fraud, it applies as well to the Gunters' state securities laws fraud claims, which are also barred by the federal law defense we adopt today.

18. See note 6, supra.

19. See part II B 2 of this opinion, supra.

20. Of course, if a transaction is actually a sham, then the "good faith" element of the defense is lacking and § 29 would not apply.

21. Neither the Supreme Court, the former Fifth Circuit, nor the Eleventh Circuit has decided whether an implied private right of action exists for violation of § 17(a) of the 1933 Act. The parties, however, have not raised this issue on appeal and it is not before us. Our discussion in this section, therefore, assumes without deciding that such an action is available. For an excellent summary of the current state of the law relating to implied private rights of action under § 17(a), see Hill v. Der, 521 F.Supp. 1370 (D.Del. 1981).

22. 15 U.S.C. § 77n states:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commissions shall be void.

15 U.S.C. § 78cc(a) states:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

23. § 28(b), 15 U.S.C. § 78bb(b) states:

> (b) Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

24. For example, section 5(a) of the 1933 Act renders unlawful the selling of unregistered securities, absent an exemption. 15 U.S.C. § 77e(a). Section 12(1) of the 1933 Act, 15 U.S.C. § 771(1), gives one who purchases a

security sold in violation of section 5(a) a right to rescind the transaction or to recover damages if he has sold the security. The 1934 Act has no comparable provision. On the other hand, section 16(b) of the 1934 Act, 15 U.S.C. § 78p, directed at trading on the basis of inside information, is a unique express liability provision with no counterpart in the 1933 Act.

25. See note 19, supra.

STATUTES AND REGULATION

United States Code, Title 12:

§ 1823. Corporation monies

(e) Whenever in the judgment of the Board of Directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank

against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or the Corporation as receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the

bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

United States Code, Title 15:

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security

registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 78 cc. Validity of contracts

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of

any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a

security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

(c) Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension

or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Code of Federal Regulations, Title 17:

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.